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No. 87-6325

IN THE

SUPREME COURT OF THE UNITED STATES

November Term, 1987

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DONALD RAY PERRY,

PETITIONER,

v.

WILLIAM D. LEEKE, COMMISSIONER, South Carolina Department of Corrections, and THE ATTORNEY GENERAL OF SOUTH CAROLINA,

RESPONDENTS.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

# Brief of the National Association Of Criminal Defense Lawyers As Amicus Curiae Supporting Respondent

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Lawyers

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## STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 5000 lawyers, including representatives of every state. The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence, and expertise of defense lawyers.

Among the NACDL's objectives is the promotion of the proper and constitutional administration of criminal justice. Consequently, the NACDL concerns itself with the protection of individual rights and the improvement of the criminal law,

its practices and procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional right to counsel as provided by the Sixth Amendment. The NACDL is very concerned about any decision that would undermine this constitutional right, as would adoption of the position taken by Respondent in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that the NACDL should offer its assistance to the Court.

The NACDL has obtained the consent of all parties to the filing of this brief: W. Gaston Fairey on behalf of Petitioner, Donald Ray Perry and Chief Deputy Attorney General Donald J. Zelenka

on behalf of William D. Leeke, Commissioner, South Carolina Department of Corrections and the Attorney General of South Carolina, Respondents. Letters of consent are on file with the Clerk of this Court.

## SUMMARY OF ARGUMENT

In finding that a fifteen minute denial of counsel did not violate the right to counsel guarantee of the Sixth Amendment, the Fourth Circuit failed to appreciate the nature of trial practice and the critical decisions which lawyers must make every day, often in a matter of seconds.

In particular, the Fourth Circuit failed to consider the important role that demeanor evidence plays in a jury's decision making process. How a defendant responds to cross-examination is often as important as his answers to an individual question, and without the advice of counsel, a defendant may well destroy his credibility by arguing with the prosecutor, glancing over to his lawyer before responding to a difficult question, failing to look the prosecutor in the

eye, or failing to listen carefully to the questions asked and volunteering information not requested.

Moreover, the Fourth Circuit erroneously held that it is improper for an attorney to discuss the substance of the client's testimony once the defendant has taken the stand, either on direct or cross. In fact, all that a lawyer is prohibited from doing is telling his client what to say. It is perfectly proper for the lawyer to go over with the defendant the questions he and his adversary will ask. It may even be necessary for defense counsel to interrupt cross-examination and ask to consult with the defendant where the prosecutor has asked the defendant to reveal matters covered by the attorney-client privilege or where the lawyer knows that the defendant has testified falsely.

A defendant could never establish what effect his arguing with the prosecutor had upon the jury. Nor could a defendant prove that he would not have presented false exculpatory testimony had he been permitted to consult with his lawyer before beginning his cross-examination. Plainly, the preclusion of counsel does not lend itself to harmless error analysis.

## ARGUMENT

### HARMLESS ERROR ANALYSIS IS NOT APPROPRIATE WHERE THERE IS A DENIAL OF COUNSEL DURING THE COURSE OF A CRIMINAL TRIAL

In Perry v. Leeke, 832 F.2d 837 (4th Cir. 1987)(en banc), the majority held that whether an order not to confer with counsel is per se reversible error depends upon whether that order constitutes an outright denial of counsel or whether it merely interferes with effective assistance of counsel.

In finding that the order complained of herein fell into the latter category, the court focused upon the trial as a whole and the amount of time that defense counsel was able to confer with the defendant. Weighing the many hours counsel and defendant spent together against the few minutes that counsel and defendant were prevented from conferring,

the majority concluded that the order was at most an interference with effective assistance of counsel and not a denial of assistance of counsel.

We believe that the court's decision is based in part upon a fundamentally flawed premise: that it is both improper and unusual for a defense attorney to consult with the defendant about his testimony once the defendant has taken the stand. As the following discussion will demonstrate, not only is it often appropriate for counsel to consult with a testifying defendant but such consultation is sometimes required by the Canons of Ethics.

An order such as the one given herein could occur anytime during a trial. But it is most likely to occur just before the beginning of a defendant's cross examination. It is at this

time that trial courts seem most concerned that a defendant might be improperly coached.

But the only thing that would be improper for a defense attorney to do would be to tell the defendant what he should say when he takes the stand. Model Rules of Professional Conduct, 3.4 (1983). It would certainly not be improper for counsel to answer any question the defendant might have or to again go over with the defendant the prosecutor's likely line of attack.

Fundamentally, the majority's analysis is flawed because of its failure take into account the importance that the defendant's demeanor plays in the jury's verdict and the role that defense counsel has in insuring that the jury does not convict the defendant based or his looks or how he answers a question.

As any trial lawyer knows, how a defendant appears in the lawyer's office, or how the defendant performs when he is examined by his own attorney in private, is little indication of how he will act on the witness stand. As Melvin Belli observed in his treatise, Modern Trials, (1982):

> I have seen the "flattest" and most unglamorous prospective witness in my office, yet when once they sat themselves upon the witness chair, they became people or entirely different quality. Everyone who has tried a case, unfortunately has experienced the converse.

Id. 773.

No matter how many hours defense counsel has spent with the defendant: going over the defendant's testimony, subjecting the defendant to grueling cross-examination, instructing the defendant on how to behave on the stand, the defendant may forget everything once the

trial has begun. And it is only after the defendant has finished his direct examination that counsel knows whether there is a problem.

The defendant, told to speak loudly and clearly, did not. The defendant, told to listen to each question carefully before answering, did not. The defendant, instructed repeatedly not to cover his mouth and not to look down at the floor, did so. At the conclusion of the direct examination, counsel knows that the jury must doubt the defendant's testimony solely because of the way the defendant testified. P. McCloskey and R. Schoenberg, Criminal Law Advocacy, 4-53 to 54 (1988); Morrill, Trial Diplomacy 2d Ed., 35 (1985).

In a matter of seconds, counsel can correct any of these errors. And counsel can remind the defendant not to do other

things which would completely destroy his credibility with the jury. Consider the following statements whispered to the defendant just before cross-examination begins.

1 "Don't deny we discussed your testimony."

In his treatise on Trial Diplomacy, Alan Morrill notes that a truthful witness's testimony can be completely discredited by a denial that he discussed his testimony with his attorney. Moreover, "[i]t takes only a few seconds to explain to him that it is perfectly proper for an attorney to interview a witness and that it would be absurd not to do so." Id. at 36-37. Accord, Givens, Advocacy: The Art of Pleading a Cause, 150 (1980).

2. "Just answer the questions asked, don't volunteer anything."

Having seen the defendant's performance on direct examination, trial counsel may realize that the defendant is having trouble controlling his tongue. While counsel must advise his client to answer all questions truthfully and completely, the defendant is under no obligation to volunteer unsolicited information and it is that unsolicited information which may cause a jury to convict. Iannuzzi, Cross-Examination: The Mosaic Art, 102 (1982).

3. "Look at the prosecutor, don't look at me. If I have an objection, I'll stand up."

In their treatise, Criminal Law Advocacy, Patrick McCloskey and Ronald Schoenberg write:

> The worst thing the witness can do (other than showing complete disinterest or disrespect) is to look at the direct examiner in the midst of cross-examina--

> tion. If he looks at the direct examiner prior to answering a question, the witness will give the appearance that he has been coached by the direct examiner and is receiving answers from him.

Id. at 4-64.

4. "Quit looking at the floor, look the prosecutor in the eye."

To be able to make a statement and look the person you are addressing straight in the eye is thought by many to be a sign or truth-telling. And the failure to do so, the sign of a liar. There are many honest people, however, who find it very difficult to look directly at the person whom they are talking with. Unfortunately this difficulty can be devastating at trial. As Morrill points out in Trial Diplomacy:

> Invariably, there will be a number of jurors who will regard this as most significant. They have heard, and

> perhaps have been taught, that people who do not look them in the eye are liars. These same jurors may now regard it as their duty to identify the deceitful fellow and enlighten their fellow jurors at the first opportunity.

Id. at 35.

5. "Calm down and don't argue with the prosecutor."

There is universal agreement among trial lawyers that it is fatal for a defendant to argue with the prosecutor. As Richard Givens observed in his treatise, Advocacy: The Art of Pleading a Cause,:

> The greatest risk for the witness is to become involved with the personality of the examiner. To placate, retaliate against, try to convince, or attempt to argue with the examiner is a diversion from the one job the witness has: simply to answer the examiner's questions.

Id. at 130. And:

> A cross-examiner will sometimes deliberately bait a witness in the hope of eliciting anger, thus destroying the witness's credibility. Explaining this trap to the witness can enable the witness to avoid it.

Id. at 134. Indeed, "Angry witnesses are more prone to rash statements, hasty judgments, and ultimately error." Kestler, Questioning Techniques and Tactics, 346 (1982). Accord McCloskey and Schoenberg, supra at 4-64; Morrill, supra at 34.

In finding that a fifteen minute interference with counsel was not a denial of counsel, the court below failed to appreciate that the most significant advice given must sometimes be given in the shortest of time. If defense counsel cannot speak to the defendant, he cannot give this advice. Yet, as much as the content of the testimony, such advice may well influence the course of the trial,

for it is often not what a person says but how that person says it which makes the most significant impression.

The court below held that since there is no entitlement to a recess before cross-examination begins, any assistance counsel could give to the defendant is simply to speculative to justify a rule of automatic reversal. 832 F.2d at 842. To support this finding the court noted that "In a majority of instances, cross examination of a witness follows direct examination without a break," and "New ideas or strategies might occur to a defendant or his counsel at any time during a trial, but there is no right to halt the proceedings in order to consult." Id.

In fact, the kind of advice which is often imparted during the course of a trial does not require a formal break in

the proceedings. Any of the admonitions mentioned above could be imparted in under five seconds. Moreover, the court's assertion that in a majority of instances cross-examination follows direct examination without interruption is unsupported by anything in the record before this Court and is not supported by the decision cited, Geders v. United States, 425 U.S. 80, 90 (1976). Geders held only that a court could control coaching by directing cross-examination to begin immediately upon the completion of direct. Geders made no findings concerning the general practice in the court's of the United States.

Breaks frequently occur during the course of a trial and may happen before and during the cross-examination of the defendant, sometimes at the request of the state. While it is true that there is

no right to halt the proceedings in order to consult, in some circumstances counsel has an absolute duty to request a consultation with the defendant. The prosecutor may, for instance, ask a question of the defendant which could potentially invade the attorney-client privilege. The defendant must be able to consult with his attorney in order not to inadvertently waive the privilege.

Moreover, defense counsel has an obligation to insure that false or perjurious testimony not be presented to the jury. After hearing an answer by the defendant which the lawyer knows to be untrue, the lawyer must approach the bench to ask to speak with his client. Model Rules of Professional Conduct, 3.3 (1983). In such a conference the lawyer will remind the defendant of the necessity of telling the truth. The lawyer

might also attempt to convince the defendant that it is in his best interest to correct his answer now, since the prosecutor will likely destroy the case with rebuttal evidence later. Indeed, a timely correction by the defendant may save the day. As Kestler noted in Questioning Techniques and Tactics:

> Just as it is inevitable that the cross-examiner will score some points against the witness, it is also likely that the witness will make a mistake or two....The best rule to follow is that a mistake should be corrected immediately with a forthright admission of error.

Id. at 348.

As the dissent points out in Perry, the circumstances in which counsel may need to consult with the defendant are almost too numerous to mention. In addition to the advice which counsel may wish to impart to the defendant, counsel may have questions for the defendant

based upon his testimony during the direct or cross-examination. Counsel may have thought of a potentially helpful question for redirect that he could not risk asking without first knowing what the defendant's answer would be. Or damaging evidence may have been elicited during the prosecutor's cross-examination which counsel cannot deal with on re-direct without first getting an explanation from the defendant. 832 F.2 at 849.

As these examples demonstrate, the most significant events in the course of a trial happen, not during an overnight recess, when lawyers and litigants have time to reflect, but in the heat of battle, when decisions must be made in an instant. It is in the courtroom itself where the defendant's ability to avail himself of counsel is at is most important.

An appellate court reviewing a cold record is ill equipped to determine whether a fifteen minute denial of counsel prejudiced the defendant. Even where there exists overwhelming evidence that the defendant was indeed the person who pulled the trigger, the defendant's demeanor on the witness stand may well have been the most important factor in the jury's decision to return a verdict of first degree murder rather than manslaughter. How can defense counsel ever prove that had he been permitted to instruct his client not to argue with the prosecutor, the verdict would have been different? How can defense counsel demonstrate the effect a certain question would have had on the jury having failed to ask the questions because he did not know what answer his client would have given? And how can counsel prevent a

court reviewing the sufficiency of the evidence from relying upon the false exculpatory statement the defendant gave at trial, which statement the defendant would have corrected had counsel been permitted to speak with his client? Clearly harmless error analysis of any kind, particularly analysis which places upon the defendant the burden of establishing prejudice, Strickland v. Washington, 466 U.S. 668 (1984), is wholly inappropriate to any denial of counsel no matter how short the period of time. Despite the majority's opinion below, the denial of counsel can never be considered harmless.

## CONCLUSION

For all the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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